No. 83-2030 (8)

IN THE

Supreme Court of the United States

October Term, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals, Tenth Circuit

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[redacted] BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT.

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Appellee.

CONSENT TO FILING

Counsel for Appellant and Appellee have consented by telephone to the filing of the within brief by the National School Boards Association. Confirming letters will be filed with the Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations,

the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The school boards of this country are charged with the responsibility for, not only the education of the children within their charge, but also the inculcation of the moral values of the community in which they are located.

The decision below not only invalidates a state statute but also tells school boards across the land that they must allow "unfit" teachers to remain in

the classroom if the subject of their unfitness in any way implicates first amendment rights. The decision holds that a teacher's first amendment rights stand on a higher plane than the right of students, required by law to be present in the classroom, to be assured that their teachers are fit to stand as role models.

ISSUE PRESENTED FOR REVIEW

Whether a school board may constitutionally dismiss, suspend or refuse to employ, a teacher, student teacher or teachers' aide because that person engaged in public homosexual conduct or activity (as defined in Oklahoma statutes) where the board has taken into account those factors set forth in the statute and, based on those factors, has found that the employee is unfit to teach.

ARGUMENT

I. INTRODUCTION

The case at bar concerns the constitutionality of a state statute which authorizes school boards to take adverse action against teachers and others who deal directly with students in the classroom when these employees' public statements have a direct relationship to his or her fitness to teach.

It may be inappropriate for Amicus, as a representative of local school boards across the country, to take a position on a state statute which merely authorizes such action. However, the lower court decision is so broad that, if upheld, the holding would immunize school teachers across the land from adverse action taken by the school board, on morality grounds, if the

action was based upon public statements of the teacher.

Amicus has no position on the question of whether sensitive personnel questions such as that presented here should be addressed in a state statute. It could be argued that such matters should be handled strictly by the local jurisdiction and the State should not involve itself in the issue.

However, the decision below not only invalidates a state statute, it also invalidates the criterion used by local school boards in determining whether teachers employed by them are fit to teach. If affirmed, the decision will seriously erode the ability of school boards to assure the health and safety of the children within their charge.

II. THE NATURE OF THE FREE SPEECH RIGHT OF TEACHERS

A. Public Employee Speech - Efficiency of Government Operation

The Supreme Court cases involving speech rights of school district employees arise out of adverse action against teachers because of their statements critical of school board policies. The rules which have been laid down by the Court in these cases relate to the effect of the statements on the management of the schools, rather than to the issue of the effectiveness of the teacher in the classroom.

The leading Supreme Court case on free speech rights of teachers, Pickering v. Board of Education, 391 U.S. 563 (1968), involved a school board that dismissed a

teacher for publicly criticizing school board policies relating to allocation of school funds.

The Court upheld the teacher's right to speak on this matter of public interest, although recognizing the difference between private citizens and public employees:

> [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees...[Emphasis supplied.]

Because of the enormous variety of factual situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnishing grounds for dismissal, we do not deem

> it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. Id at 569.

The court of appeals below places reliance, in part, on Pickering. However, the case is inapposite. First, Pickering limits the first amendment rights of public employees, such speech not being entitled to the same level of protection as speech of private citizens. Second, the standard in Pickering for determining whether the employee's speech is protected is not relevant here, because Pickering involved political speech. That speech is protected, even when made by an employee, unless the particular nature of the employee's position in the schools and the nature of the comments made (i.e. their relationship to the workings of the school

district) justify the action of the school board in dismissing the teacher in light of its interest in "promoting the efficiency of its operations."

Here the public employee is not subject to disciplinary action because of the political nature of his speech, but because of the immoral nature of the speech. Further, the statute at issue here does not apply to all public employees, but only to those employees who have direct contact with students.

Arguably, if the speech seriously affects the students, then the speech also seriously affects the efficiency of the operation of the school district. However, efficency is less important here than the welfare of the students.

The other leading Supreme Court case

on teacher free speech rights is Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979), in which the Court held that the first amendment protects critical statements made in private by a teacher to a superior. In contrast, the statute at bar concerns only public statements which are shown to have come to the attention of the students.

Lower court decisions also involve the issue of the effect of teacher statements on the ability of the school board and its administrators to manage the schools, an issue which is equally important in any other public agency. See, e.g., Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir. 1977) (complaint

that Mexican children were being placed in special education classes based on tests given in English rather than in Spanish); Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982) (a critical evaluation of a community college's class scheduling and curriculum changes by an instructor); Lemons v. Morgan, 629 F.2d 1389 (8th Cir. 1980) (a radio station manager who broadcast editorials which were not complimentary of the school board or superintendent); Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3rd Cir. 1980) (a group of professors who opposed their university president's proposal to increase the student-faculty ratio).

B. Political Speech - "Substantial Disruption"

The lower court also places reliance on the standard set out in Tinker v. Des

Moines Independent Community School District, 393 U.S. 503 (1969) which also involves political speech and which stands for the proposition that student speech is protected unless it "substantially disrupts" the educational process.

The cases focusing on the analysis in Tinker concern political statements which do not involve the administration of the schools. Such statements also enjoy first amendment protection, provided they do not result in "substantial interference or disruption in the normal activities of the school."

We are dealing in the case at bar not so much with "disruption" of the educational process, as with the welfare of the students. Students may be subjected to serious harm by being forced to remain in the classroom with an unfit teacher, but

yet it might be difficult to show that the school is "substantially disrupted."

C. Immoral or Illegal Conduct

Lower court decisions on the subject of political speech of students are quite consistent; however, when the subject of the speech raises questions of obscenity or morality, the courts diverge in their application of the "substantial disruption" standard of Tinker, supra.

For example, in Trachtman v. Anker, 563 F.2d 512, (2d Cir. 1977), cert. denied, 435 U.S. 925 (1977), the court upheld the denial of a high school newspaper editor's right to distribute a questionnaire surveying the sexual activities and birth control practices of his fellow students. The ground for the denial was that the results of the survey might invade the

privacy of younger students, who might not be mature enough to handle the story's intimate information.

In contrast, the Fourth Circuit in Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977), ruled that a student newspaper is a public forum and therefore entitled to first amendment protection when it carried a story on birth control methods.

On the question of the statute's prohibition of advocacy of illegal acts, the majority below also relies on Brandenburg v. Ohio, 395 U.S. 444 (1980). However, that case merely stands for the proposition that a citizen cannot be subjected to criminal penalties for advocating illegal activity, in the absence of a showing that the advocacy also incites

to "imminent lawlessness."

There is a wide body of law on the question of teacher dismissals for immoral or illegal conduct. Traditionally, the courts accepted a "reasonable cause" for termination if it were shown that the conduct outside the classroom "set a bad example" for students. Later state courts began to use a "nexus" standard which required the board to show that the outside conduct bears a relationship to the teacher's fitness to teach. F. Delon Teacher Dismissal for Immoral and Illegal Conduct, 1982 School Law Update 154 (National Organization on Legal Problems of Education 1983).

At least one state attorney general has opined that "no constitutional right to

a deviant sexual preference" exists and thus, his argument goes, school boards may dismiss teachers who have a reputation of homosexuality, because in that state homosexuality is considered immoral. West Virginia Schools Can Fire Homosexual Teachers on 'Reputation', Education Times, (March 7, 1983).

Although most courts do not go that far, they do scrutinize questionable sexual behavior of teachers more closely than other public employees. E. Bolmeier, Sex Litigation and the Public Schools 41, The Michie Company, 1975).

Several lower federal court cases have upheld the dismissal of homosexual employees upon a showing of an adverse

effect on the educational process. See, e.g., Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), aff'd on other grounds, 491 F.2d 489 (4th Cir. 1974), cert. denied, 405 U.S. 1046 (1972); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972).

In Acanfora, the court recognized that knowledge of the homosexuality of the teacher was not enough to subject him to disciplinary proceedings, nor was his attendance at public gatherings and speaking out on the subject. However, the court held that where the teacher's conduct sparks controversy and produces imminent effects which are deleterious to the educational process, disciplinary action could be taken.

State cases as well impose this nexus

requirement, ie that it must be shown that the homosexuality of the teacher in some way adversely affects the students and the educational environment. See, e.g., Board of Educ. of Long Beach v. Jack M., 566 P.2d 602 (Cal. 1977).

Courts have upheld this nexus requirement in other cases involving morality, holding that teachers have a right to privacy and the school board must show a connection between the alleged immoral conduct of the teacher and the teacher's fitness to teach. Drake v. Covington City Bd. of Educ., 371 F. Supp. 974 (M.D. Ala. 1974), Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982).

The dissent in the case at bar relied on the illegality of the activity, stating

that "sodomy is malum in se, i.e., immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state." Jurisdictional Statement, Appendix at 10a. Thus, the dissent argues, such conduct is not entitled to first amendment protection. "In the context of the public school system involving the teacher-student relationship, it cannot be said that the advocacy of such action is mere advocacy of an abstract doctrine or belief.", Id. at 12a.

State cases involving illegal, rather than merely immoral conduct, are not consistent. Some continue to require a factual showing of a connection between the illegal conduct and the fitness of the

teacher to teach. Golden v. Board of Educ., 285 S.E.2d 665 (W. Va. 1981). Others hold that the mere conviction of a felony is enough to show a nexus. Skripchuk v. Austin, 379 A.2d 1142 (Del. Super. Ct. 1977).

The majority's reliance on Brandenburg is misplaced. That case involved a private citizen who was prosecuted solely because of the content of his speech, not because of any adverse consequences which resulted from the speech. The case did not involve public school teachers who because of their position are subject to a higher standard of conduct. And, most importantly, that case did not involve a statutory requirement of nexus where the State must prove that the speech will result in serious damage to a vital state interest.

III. HARMFUL EFFECT ON STUDENTS OF ILLEGAL OR IMMORAL ACTIVITIES OF TEACHERS

The issue which the Court must resolve here is whether the State may declare that homosexuality is a subject which a school board may, without contravening the first amendment, treat differently than other subjects when making decisions as to the hiring or retention of public school teachers.

Since there are no facts upon which the Court can base its decision, it would seem that the Court must decide: first, whether the Constitution permits a school board to dismiss, or otherwise adversely treat, a teacher where the speech relating to his or her homosexuality is shown to affect the teacher's fitness to teach and;

second, if there are situations where a school board could so act, the Court must then decide if there are ample criteria in the statute to assure that a school board, acting pursuant to the statute, has sufficient evidence to warrant the action taken against the teacher.

As noted above, Amicus has no position on the merits of the statute itself, but urges this Court not to overturn the statute without noting that a board would have authority to take action against a teacher for public advocacy of illegal or immoral activity, such as homosexual activity, where the advocacy is shown to affect the teacher's ability to teach.

Having concluded, then, that the cases cited in the majority opinion below are not applicable here, what then should be the

standard for this Court's review?

Courts have long recognized the need of the State to inculcate community values and to protect young children, from outside influences which may be detrimental to that end. Milliken v. Bradley, 94 S.Ct. 3112 (1974); East Hartford Education Asssociation v. Board of Education, 562 F.2d 838 (2d Cir. 1977).

Although neither students nor teachers "shed their rights at the schoolhouse door", Tinker v. Des Moines Independent Community School District, supra, the Supreme Court has recognized that the free speech protections afforded children differ from those afforded adults. "[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the

case of other freedoms...." Prince v. Massachusettes, 321 U.S. 158 (1944).

Differences are also recognized between adults as citizens as adults who are dealing with children. For example, the state could not constitutionally prohibit vendors from selling "obscene" materials to adults but it could prohibit vendors from selling the same merchandise to minors. In Ginsberg v. State of N.Y., 88 S.Ct. 1280 (1968), the Court stated: "Even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults...."

In recent years the Supreme Court has also reaffirmed its recognition of the role which the public schools play in "'the

preparation of individuals for participation as citizens' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system,'" and that "'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" Board of Educ. v. Pico, 102 S.Ct. 2799, 2807 (1982).

In 1979 the Court, in a case challenging the constitutionality of a New York statute denying teaching certificates to aliens, held that the State had met its burden of showing that a rational relationship existed between the classification and the State's need to assure that all those who deal directly with public school chidlren in the

classroom are U.S. citizens. Ambach v. Norwick, 99 S.Ct. 1589.

Justice Powell, writing for the majority, stated:

> "Within the public school system, teachers play a critical part in developing students' attitude toward governbment and understanding of the role of citizens in our society.
>
> "No amount of standardization of teaching materials or lessor plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitude of students toward government, the political process and a citizen's social responsibghilities. This influence is crucial to the continued good health of a democracy. (Emphasis supplied."

The district court below noted cites

the Supreme Court decision in Shelton v. Tucker, 364 U.S. 479, 485 (1960) to evidence the special role of the public schools and the role of the public school teacher:

> There can be no doubt of the right of the State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. 'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.' Adler v. Board of Education, 342 U.S. 485, 493. There is 'no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors. [cite omitted]

Certainly the First Amendment precludes the state from taking adverse action against a teacher solely because of that person's status as a homosexual, although apparently the State does have the

power to declare homosexual activities illegal. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) aff'd mem., 425 U.S. 901 (1976).

Thus, the next step is to determine whether the State can take action against employees who engage in those activities. Even the Court of Appeals below noted that the statute relating to teachers engaging in "homosexual activity" passes Constitutional muster. Jurisdictional Statement, Appendix page 8a.

Finally, the question arises as to whether action can be taken against employees who merely speak on the prohibited subjects.

The state of the art of psychiatry is simply not such that anyone can state with certitude that certain susceptible students

will become homosexual because they are taught by homosexual teachers. Thus, such a contention cannot authorize the state to take action to eliminate all homosexual teachers from the public schools. It is indeed doubtful that any court would uphold the West Virginia Attorney General opinion, supra.

The question here, however, is not whether a school board may constitutionally take adverse action against an employee because he or she is homosexual. The question is whether the state can take such action where it is shown that the person's advocacy of homosexual activity is such that (1) it will come to the attention of school children and (2) the person is rendered unfit because of such action, to hold a position as a teacher. The burden

is on the school board to show the standard of "unfitness" has been met. Although, the burden may not be easy to overcome, nevertheless the school board should be allowed to attempt to meet it.

The court below relies on two Supreme Court cases for its decision. Brandenburg and Tinker, supra. Brandenburg involved a defendant convicted of "advocating" a criminal act. The Court distinguished between "mere advocacy" and "incitement to imminent lawless action", 395 U.S. 444, 449.

In the instant case, school boards are not authorized to terminate teachers merely because they advocate homosexual activity. They can be terminated only if that advocacy results in their being rendered unfit to teach.

The court below relies on Tinker for the proposition that a teacher's free speech right is outweighed by the interest of the state only where it is shown that the "expression results in a material or substantial interference or disruption in the normal activities of the school."

In Tinker, school officials disciplined students for wearing black armbands as a symbolic protest against the Viet Nam War. The state's underlying motivation to suppress as unpatriotic the protest of U.S. involvement in the Viet Nam War, was not relevant and would not countervene the students' right to silent protest. Similarly, the same rule applies to the silent protest of teachers in the classroom, James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972), the only

legitimate interest of the State in either case being to assure order in the classroom.

In the case at bar, however, the "disruption" standard is difficult to apply. Here, the statute does not authorize school boards to discipline teachers because of political speech. Instead, the speech at issue here countervails the State's moral standards, as defined in its criminal code giving the state a special interest in the effect the speech has on its public school students.

A homosexual teacher may indeed engage in political speech that by advocates the repeal of laws against homosexuality. However, the purpose of the statute is not to keep the teacher from engaging in political speech but to keep the teacher

out of the classroom where that speech creates a serious question of his fitness to teach.

If the courts agree with the premise that the public schools, acting in the stead of the parents, have a legitimate interest in promoting in its public school children the moral code of the community, then it follows that the state may also take action against its teachers where the teachers' speech, which would otherwise be protected, substantially interferes with that public interest.

The disruption standard also poses difficult problems in application because the isntant case does not concern "disruption" in the usual sense of causing a physical disturbance, but "disruption" in the sense of seriously disturbing students

in the complex process of maturation.

> A class of sixth graders, entering adolescence and troubled by their own developing sexuality may be significantly disrupted by the presence of a homosexual teacher who has recently expressed his or her views on the subject in a number of local newspapers. As a result the teacher may be unable to perform the daily duties expected of teachers. Free Speech Rights of Homosexual Teachers Columbia Law Review 1524 (1980).

It is truly a "balancing" of the right of teachers as citizens to state their views and even to advocate homosexuality, and the state's interest in assuring that the public comments of such teachers, who are role models in the classrooms in which the children are required by law to be present, do not confuse and disturb the children in his charge. Although under most circumstances the first amendment free

speech protection is of the highest order, the state's duty to protect its children is higher.

Realistically, it may be difficult indeed to show that public statements on this subject render a teacher unfit. And certainly the State would be required to meet all Due Process procedures before taking any action against such employees. However, the issue here is not the quantum of proof but whether, once proved, the State can act.

We must accept the fact that a legitimate goal of the schools is to give children the "utmost opportunity to be essentially normal in this important phase of life." Acanfora v. Board of Education of Montgomery County, 359 F. Supp. 843, 847 (1973).

As noted above, the behavioral sciences cannot provide absolutes relating to cause and effect of homosexuality. However, there is evidence to the effect that a known homosexual teacher may serve as a model to a young child with bisexual tendencies and his or her removal from the classroom would result in a freer choice for the child. Acanfcra, 259 F.Supp. at 847.

Although it can be argued that homosexuality is a status over which homosexuals have little control, nevertheless courts have uniformly upheld statutes outlawing sodomy, even between consenting adults, the act being almost universally considered "immoral" in this society. See, eg, Doe v. Commonwealth's Attorney, supra.

We must emphasize that we do not advocate here a "pall of orthodoxy" in the public schools. Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799 (1982). Whatever the feelings of the community about homosexuals and homosexuality, the school board should not have the right to treat such persons any differently than they do other employees unless their conduct, as a result of their homosexuality, seriously impairs their ability to act as teachers. There the moral code of the community is legally relevant.

The statute at issue here is very careful to specify the matters which must be taken into account before adverse action can be taken. There are education codes which go so far as to authorize termination

of teachers solely because they are homosexual or because they advocate homosexuality. Sex Litigation and the Public Schools, supra at page 41.

However, that is not true of the statute here. There must be a relationship between the speech and some adverse effect on the students. The statute lays out four factors to be considered in determining whether a teacher has been rendered unfit because of public homosexual conduct or activity:

- o The likelihood that the activity or conduct may adversely affect students or school employees. This would likely require expert testimony or, at the least, direct evidence of harm.

- o The proximity in time or place of the activity or conduct to the teacher's...official duties. If a teacher in Illinois makes a speech at a convention in New York, the school board is

unlikely to sustain its argument that it affected students in any way. If the teacher wrote a little-known article when he was in college, that event is probably too remote to affect his students now. However, if the teacher speaks at a widely publicized rally in the small community in which he teaches, that may very well be shown to affect the students.

- o Any extenuating or aggravating circumstances. That would include matters such as the age of the children in the teacher's class; the relative "liberality" of the community eg the statements may have less of an adverse effect where the community has taken steps to educate children on such matters; the sensitivity of the teacher in dealing with his homosexuality.

- o Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity. This, together with the age of the students, is the most important factor to be considered. It may be difficult, if not impossible, to prove but it would seem to be a controlling

factor if proved.

CONCLUSION

The question of dismissal, or other adverse treatment, of public school teachers because of their immorality (whether based on illegal activities or merely those which are immoral based on general community standards) is a difficult one.

However, elementary and secondary age children are required by the law of every state to either attend public schools or pay for their education in a private school. Given these constraints, school districts must adhere to the moral standards of the community, even to the extent of limiting the rights of those who teach in the schools.

We are not dealing with college students with sufficient maturity to handle discrepancies between the moral teachings of their parents and those of their teachers.

Although this type of activity might better be regulated by local officials, on a case-by-case basis, the criteria set forth in the statute at issue here are the same criteria which a local school board should use in determining whether the speech of a teacher adversely affects the students in the teacher's classroom.

Amicus urges the Court to either uphold the statute, on its face, or at the least to affirm that school boards have the constitutional authority to use similar criteria to that in the statute to determine the suitability of teachers; ie,

the fitness of teachers to teach may be determined by the nature of their spoken statements outside the classroom.

Respectfully submitted,

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upheld restrictions upon advocacy even against non-public employees when "fighting words" were likely to interfere with the orderly function of the society generally. Terminiello v. Chicago, 337 U.S. 1 (1949). See also Feiner v. New York, 340 U.S. 315 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

If Oklahoma cannot remove teachers from the public schools who advocate disobedience of criminal laws with regard to sexual activity, it could not remove teachers who advocate other forms of unlawful conduct, such as violation of society's laws against the use or distribution of narcotics.

In Connick v. Myers, supra, this Court upheld dismissal of an assistant district attorney who circulated a memo which the Court found had a potential

for "undermining office relations." 461 U.S. at 152. The State asserts that it should also be found that a teacher who advocates homosexual activity outside the classroom may also undermine the delicate relationship between student and teacher and may cause dissention among the students themselves.

CONCLUSION

For the reasons stated, it is respectfully requested that the Judgment the United States Court of Appeals for the Tenth Circuit be reversed and that the constitutionality of the Oklahoma

statute in question, Okla. Stat. Ann. tit. 70, § 6-103.15 be upheld.

Respectfully submitted,

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